

1 Brian Segee (Cal. Bar No. 200795)
2 Center for Biological Diversity
226 W. Ojai Ave., Ste. 101-442
3 Ojai, CA 93023-3278
4 Phone: (805) 750-8852
5 Email: bsegee@biologicaldiversity.org
Pro Hac Vice

6 Attorney for Plaintiffs
7

8 **IN THE UNITED STATES DISTRICT COURT**
9 **FOR THE DISTRICT OF ARIZONA**
10 **TUCSON DIVISION**

11 Center for Biological Diversity,
12 et al.,

13 Plaintiffs,
14

15 v.

16 U.S. Fish and Wildlife Service,
17 et al.,

18 Defendants.
19

Case No.: 4:24-cv-146-RCC

**Plaintiffs' Controverting
Statement of Facts**

20 Pursuant to Local Rule 56.1(b), Plaintiffs submit this Statement of
21 Controverting Facts in relation to its opposition to Defendants' Motion for
22 Summary Judgment. Plaintiffs herein reproduce the numbered paragraphs
23 from Defendants' Statement of Material Facts, ECF No. 18, and provide
24 Plaintiffs' response below.
25

26 1. The red squirrel is a small, grayish-brown arboreal (tree-dwelling)
27 rodent with a rusty-to-yellowish tinge along the back. AR 1575. The tail is
28 fluffy, and the ears are slightly tufted in winter. *Id.*

1 Response: Undisputed.

2 2. There are two recognized subspecies in Arizona, and the Mount Graham
3 red squirrel is found only in the Pinaleno Mountains in southeastern Arizona.
4 *Id.* The Mount Graham red squirrel is slightly smaller than the other
5 subspecies found in Arizona, with an average body length of 7.8 inches and an
6 average tail length of 5.4 inches. AR 1575-76; *see also* 52 Fed. Reg. 20994 (June
7 3, 1987).

8 Response: Undisputed.

9 3. The Mount Graham red squirrel is designated as a subspecies based on
10 genetic, morphological, and ecological conditions. AR 1576.

11 Response: Undisputed

12 4. On June 3, 1987, the United States Fish and Wildlife Service (“the
13 Service”) listed the Mount Graham red squirrel as endangered under the ESA.
14 52 Fed. Reg. 20994.

15 Response: Undisputed.

16 5. The Mount Graham red squirrel inhabits upper elevation, mature-to-
17 old-growth associations in mixed conifer and spruce-fir above approximately
18 8,000 feet. AR 1579.

19 Response: Undisputed.

20 6. At the time of listing the squirrel was found at the highest density in
21 Engelmann spruce and corkbark fir, generally occurring above an elevation of
22 10,200 feet, and in lower densities in old growth-Douglas fir and white fir often
23 associated with Engelmann spruce. 52 Fed. Reg. at 20994.

24 Response: Undisputed.

25 7. The Mount Graham red squirrel’s diet consists of conifer seeds from
26 closed cones, above- and below-ground macro-fungi and rusts, pollen and cone
27 buds, cambium of conifer twigs, bones, and berries and seeds. AR 1581. During
28 the winter the squirrel depends on seed-bearing cones from Engelmann

1 spruce, white fir, Douglas-fir, corkbark fir, and southwestern white pine
2 stored in sites known as middens. 52 Fed. Reg. at 20994; AR 1581. It is
3 important that middens remain cool and moist to preserve the cones. 52 Fed.
4 Reg. at 20994.

5 Response: Undisputed.

6 8. On January 5, 1990, the Service designated critical habitat for the
7 Mount Graham red squirrel containing three areas totaling approximately
8 2,000 acres. 55 Fed. Reg. 425, 427 (Jan. 5, 1990). The areas included: (1) the
9 area above the 10,000-foot contour surrounding Hawk Peak and Plain View
10 Peak, plus an area above the 9,800-foot contour; (2) the area on the north-
11 facing slopes of Heliograph Peak above the 9,200 foot-contour; and (3) the area
12 on the east-facing slope of Webb Peak above the 9,700-foot contour. AR 35, 55
13 Fed. Reg. at 428.

14 Response: Undisputed.

15 9. The Service determined that the best data available at the time of
16 designation supported the importance of designating the higher elevations as
17 critical habitat. AR 33. Specifically, the Service considered that, in 1986, 48%
18 of all active middens were above 10,200 feet and the proposed critical habitat
19 contained approximately 70% of all known squirrel middens. AR 33.

20 Response: Undisputed.

21 10. Following the designation of critical habitat, the Service issued the 1993
22 Recovery Plan for the Mount Graham red squirrel. AR 1239-1417.

23 Response: Undisputed.

24 11. The Recovery Plan provided a long-term strategy to recover degraded
25 and unsuitable forests and a scheme that will provide for mature forest and
26 suitable habitat over time, which is essential to the recovery of the species.
27 AR 1261. It further provided that the major forest association of concerns are
28 the spruce-fir, mixed confer, and the transition between the two types. *Id.*

1 Response: Undisputed.

2 12. In 2011, the Service drafted a first revision to the Mount Graham red
3 squirrel recovery plan. AR 1565.

4 Response: Undisputed.

5 13. On December 14, 2017, the Service received a petition from the Center
6 for Biological Diversity requesting that critical habitat for the Mount Graham
7 red squirrel be revised. AR 2-19.

8 Response: Undisputed.

9 14. The petition provided information alleging that circumstances within
10 the designated critical habitat area had changed significantly. AR 85. It
11 further alleged that the Mount Graham red squirrel was then found primarily
12 in four areas outside of the designated critical habitat area. AR 13.

13 Response: Undisputed.

14 15. The petition also noted a previous Service report (DeLuise 1990) that
15 evaluated the Biological Opinion on the Coronado National Forest Plan and
16 Mt. Graham Astrophysical Area Plan. Part of the report recommended that
17 the critical habitat in 1990 should be reviewed. AR 12-13.

18 Response: Undisputed.

19 16. In determining whether a revision to critical habitat may be warranted,
20 the Service may consider the following:

21 a. Areas that the current designation does not include that should be
22 included, or includes that should no longer be included, and any benefits of
23 designating or not designating these specific areas as critical habitat;

24 b. The physical or biological features essential for the conservation of the
25 species and whether they may require special management considerations or
26 protection;

27 c. For any areas petitioned to be added to critical habitat within the
28 geographical area occupied by the species at the time it was listed, information

1 indicating that the specific areas contain one or more of the physical or
2 biological features (including characteristics that support ephemeral or
3 dynamic habitat conditions) that are essential to the conservation of the
4 species, or that these features do not require special management
5 considerations or protection;

6 d. For any areas petitioned for removal from currently designated critical
7 habitat within the geographical area occupied by the species at the time it was
8 listed, information indicating that the specific areas do not contain the
9 physical or biological features (including characteristics that support
10 ephemeral or dynamic habitat conditions) that are essential to the
11 conservation of the species, or that these features do not require special
12 management considerations or protection; and

13 e. For areas petitioned to be added to or removed from critical habitat that
14 were outside the geographical area occupied by the species at the time it was
15 listed, information indicating why the petitioned areas are or are not essential
16 for the conservation of the species.

17 AR 1715, 84 Fed. Reg. 46927, 46929 (Sept. 6, 2019).

18 Response: Undisputed.

19 17. Upon review of the petition and its cited sources, the Service found that
20 the petition presented substantial scientific and commercial information
21 indicating that a revision of the Mount Graham red squirrel's critical habitat
22 may be warranted, resulting in a "positive" 90-day finding. AR 1716.

23 Response: Undisputed.

24 18. The Service based its findings primarily on new information indicating
25 significant changes to the habitat as currently designated and changes to the
26 squirrel's use of habitat. These findings were published on September 6, 2019.
27 *Id.* at 1713; 84 Fed. Reg. 46927.

28 Response: Undisputed.

1 19. On August 3, 2021, the Service published its 12-month finding in
2 response to the Center’s petition. AR 1722-1723, 86 Fed. Reg. 41742 (Aug. 31,
3 2021).

4 Response: Undisputed.

5 20. Under Section 4(b)(3)(D)(ii) of the ESA, where a petition presents
6 substantial information that a revision may be warranted, the Secretary shall
7 “determine how [s]he intends to proceed with the requested revision, and shall
8 promptly publish notice of such intention in the Federal Register.” 16 U.S.C.
9 § 1533(b)(3)(D)(ii).

10 Response: Undisputed.

11 21. The Service explained that they “intend that any revisions to critical
12 habitat ... be as accurate and comprehensive as possible. Therefore, completing
13 the [species status assessment] and a revised recovery plan will inform any
14 future revisions to the critical habitat for the red squirrel.” AR 1723. The
15 Service intends to evaluate the function of critical habitat for the red squirrel
16 in the conservation of the subspecies after completing the species status
17 assessment and a revised recovery plan and, if appropriate, revise the species’
18 critical habitat if prudent and determinable. AR 83.

19 Response: Undisputed.

20 22. On February 2, 2022, the Service published notice of the initiation of the
21 five-year status review for the Mount Graham red squirrel. 87 Fed. Reg. 5834
22 (Feb. 2, 2022).

23 Response: Undisputed.

24 23. On August 27, 2024, the Service published the Mount Graham red
25 squirrel five-Year Status Review.¹

26 Response: Undisputed.

27 ¹ [https://ecosphere-documents-production-](https://ecosphere-documents-production-public.s3.amazonaws.com/sams/public_docs/species_nonpublish/18261.pdf)
28 [public.s3.amazonaws.com/sams/public_docs/species_nonpublish/18261.pdf](https://ecosphere-documents-production-public.s3.amazonaws.com/sams/public_docs/species_nonpublish/18261.pdf) (last visited Nov.
12, 2024).

1 Respectfully submitted this 20th day of December, 2024.

2 s/ Brian Segee

3 Brian Segee (Cal. Bar. No. 200795)

4 Center for Biological Diversity

5 226 W. Ojai Ave., Ste. 101-442

6 Ojai, CA 93023-3278

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9 *Pro Hac Vice*